No. 401

FILED
OCT 14 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

DISTRICT OF COLUMBIA, *Petitioner,*

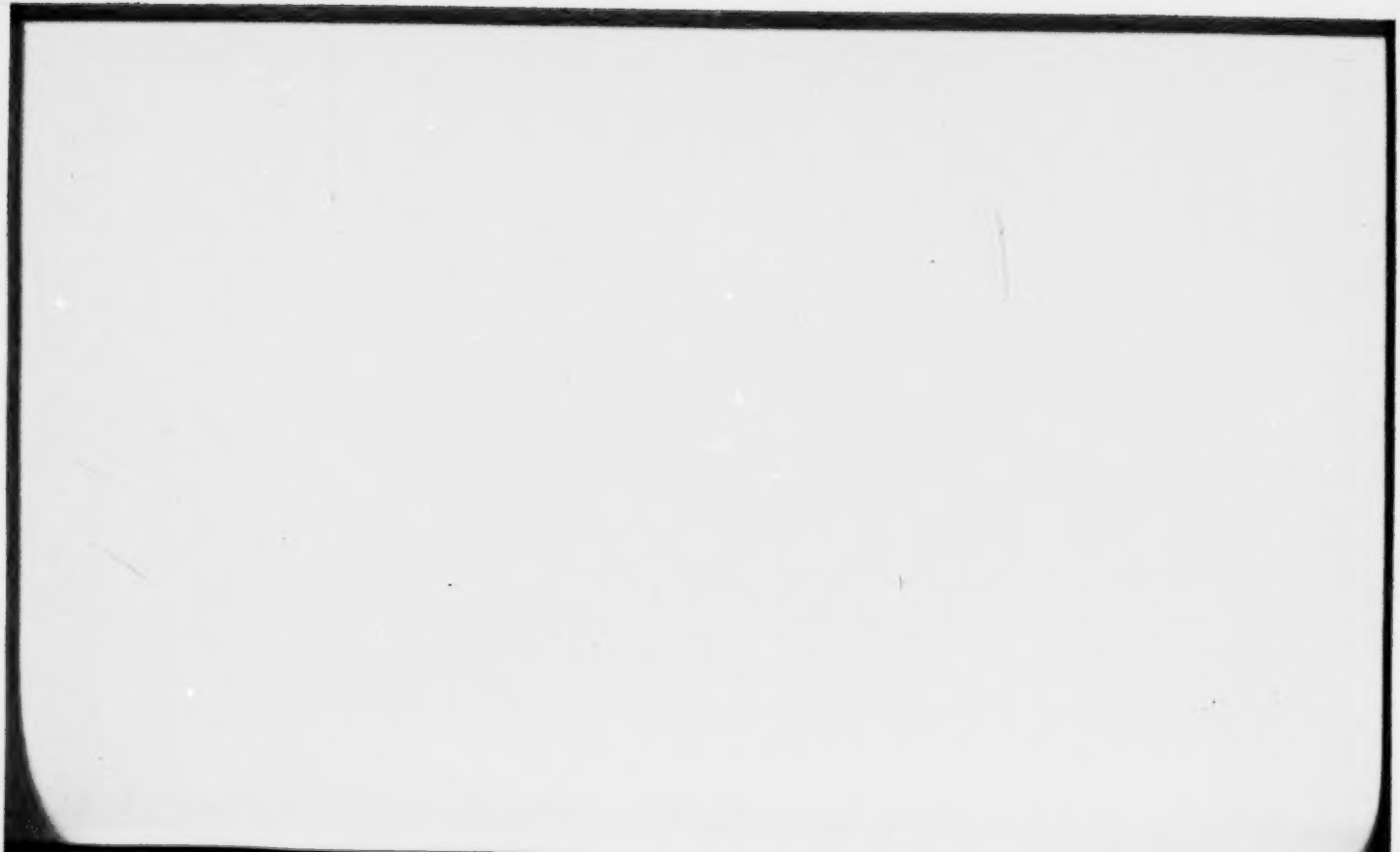
v.

BANK OF COMMERCE AND SAVINGS,
THE SECURITY SAVINGS AND COMMERCIAL BANK,
THE CITY BANK OF WASHINGTON,
McLACHLEN BANKING CORPORATION,
ANACOSTIA NATIONAL BANK OF WASHINGTON,
INDUSTRIAL BANK OF WASHINGTON, INC.,
THE CITIZENS' BANK OF WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

VERNON E. WEST,
Corporation Counsel, D. C.
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.
GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.
HARRY L. WALKER,
Assistant Corporation Counsel, D. C.
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA



INDEX

Subject Index

	PAGE
Petition	1
Statement of the Matter Involved	1
Jurisdiction	9
Question Presented	9
Reasons Relied on for Allowance of the Writ	9
Brief in Support of Petition	13
Opinions Below	13
Grounds of Jurisdiction	13
Statement of the Case	13
Provisions of Constitution and of Statutes Involved	14
Argument	15
The question is important	15
Conclusion	19
Appendix (opinion of the United States Court of Appeals for the District of Columbia Circuit on the first appeal in *Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 156 F. 2d 843	21-29

Cases Cited

District of Columbia v. *Hamilton National Bank*, No. 385, October Term, 1949 — 3, 4, 5, 6, 19

Frost v. *Wenie*, 157 U. S. 46, 39 L. Ed. 614, 619, 15 S. Ct. 532 — 19

Hamilton National Bank v. *District of Columbia*, 81 U. S. App. D. C. 200, 156 F. 2d 843 — 5, 9, 10

Helvering v. *Lerner Stores Corp.*, 314 U. S. 463, 468, 86 L. Ed. 343, 62 S. Ct. 341 — 17

United States v. *Henderson*, 78 U. S. (11 Wall.) 652, 657, 20 L. Ed. 235 — 19

Watts v. *American Security & Trust Co.*, (Mun. Ct. App., D. C.), 47 A. 2d 100 — 18

Wilmot v. *Mudge*, 103 U. S. (13 Otto) 217, 26 L. Ed. 536 — 19

Wood v. *United States*, 41 U. S. (16 Pet.) 342, 10 L. Ed. 987 — 19

PAGE

OTHER AUTHORITIES

Constitution of the United States ---- 13, 14, 19
Article I:
Sec. 8
Clause 17 ---- 2, 14
Fifth Amendment ---- 10, 14, 17, 19

STATUTES CITED

Act of July 1, 1902 (32 Stat. 619, c. 1352) ---- 2, 14
Sec. 6
Par. 5, as amended ---- 14
Par. 7, as enacted in 1902 ---- 14, 15
Par. 7, as amended in 1904 ---- 15
Act of April 28, 1904 (33 Stat. 564, c. 1815) ---- 2, 15, 18
Act of July 26, 1939 (53 Stat. 1107, c. 367):
Title IV
Sec. 2 ---- 19
Act of June 25, 1948 (62 Stat. ---, c. ---) ---- 9
United States Code:
Title 28, Sec. 1254 ---- 9
D. C. Code (1940 ed.:)
Sec. 47-1701 ---- 2, 3, 4, 5, 7, 8, 14, 16, 17, 18, 19
Sec. 47-1703 ---- 2, 3, 5, 6, 7, 8, 15, 16, 17, 18, 19

No. ———

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

DISTRICT OF COLUMBIA, *Petitioner,*

v.

BANK OF COMMERCE AND SAVINGS,
THE SECURITY SAVINGS AND COMMERCIAL BANK,
THE CITY BANK OF WASHINGTON,
McLACHLEN BANKING CORPORATION,
ANACOSTIA NATIONAL BANK OF WASHINGTON,
INDUSTRIAL BANK OF WASHINGTON, INC.,
THE CITIZENS' BANK OF WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, a municipal corporation, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED.

All of the statutes involved in these proceedings were enacted by the Federal Congress in the exercise of its ex-

clusive power to legislate for the District of Columbia under Art. I, Sec. 8, Cl. 17, of the Federal Constitution.

An act of Congress of July 1, 1902 (codified as Sec. 47-1701, D. C. Code, 1940, and hereinafter referred to as "Sec. 1701"),[1] which was enacted by the Congress in 1902, imposes a tax of 6% upon the gross earnings of "Each national bank * * * and all other incorporated banks and trust companies in the District of Columbia." Another portion of the 1902 statute provided for a different method of taxing "Savings banks having no capital stock and paying interest to their depositors", which is now codified as the first paragraph of Sec. 47-1703, D. C. Code, 1940.[2]

By an Act of April 28, 1904,[3] Congress added to the District bank tax statutes what is now the second paragraph of Sec. 47-1703, D. C. Code, 1940 (hereinafter referred to as "Sec. 1703"). It provides that "Incorporated savings banks paying interest to their depositors" shall pay upon their gross earnings, less the sums paid as interest to their depositors, an annual tax of 4%. In the words of the Court below, this Amendment "had the obvious effect of giving to 'incorporated savings banks paying interest to their depositors' more favorable tax treatment than that which § 1701 gives to 'each national bank and all other incorporated banks and trust companies' " (R. 478).

The several banks of the District of Columbia include not only national banks but other banks incorporated under the laws of the District of Columbia or of one of the States, which are hereinafter referred to as "non-national banks". These other banks are the seven respondents to this petition. Each of the non-national banks conducts, as do national banks, a commercial banking business and also has, as have national banks, substantial savings deposits upon which it pays interest. Both national and non-national

---

[1] See p. 14, *infra*.
[2] See p. 15, *infra*.
[3] 33 Stat. 564, ch. 1815. See p. 15, *infra*.

banks in the District of Columbia are under the regulatory control of the Comptroller of the Currency. For many tax years prior to the tax year here involved, the taxing authorities of the District classified the non-national banks as "incorporated savings banks paying interest to their depositors" under the second paragraph of Sec. 1703, and collected taxes from them at the rate therein prescribed. For many tax years prior to and including the tax year here involved, the taxing authorities have classified national banks in the District for taxation under Sec. 1701, and assessed taxes against them at the rate therein prescribed. (R. 478.)

Sec. 1701 requires national banks, *inter alia,* in the District of Columbia to file annual reports of gross earnings with the Assessor. Hamilton National Bank (hereinafter referred to as "Hamilton"), filed a report showing its gross earnings. In reporting its taxable earnings Hamilton had deducted from its gross earnings the interest paid by it to depositors on time and savings deposits. On September 1, 1944, the Assessor disallowed the said deduction and presented to Hamilton a bill for taxes on the gross earnings reported plus the deduction disallowed. (R. 478; see also R. 129, *District of Columbia* v. *Hamilton National Bank,* No. 385, October Term, 1949.)

Hamilton paid the tax under protest in writing and thereafter seasonably filed its petition with the Board of Tax Appeals for the District of Columbia (hereinafter referred to as the "Board") for a reduction of the amount of the assessment by such amount as represented the additional taxes upon the ground that the Assessor had erred in refusing to allow it to deduct from its gross earnings the interest paid during the year to its savings depositors (p. 22, *infra*). At the hearing Hamilton introduced evidence proving that certain incorporated non-national banks, some of the respondents herein, which carried on a savings and commercial banking business in the District

of Columbia similar to that done by Hamilton, had been permitted by the Assessor to deduct interest paid depositors on time and savings deposits in computing their gross earnings for tax purposes. (p. 25, *infra*).

The Board held that Hamilton could not deduct the interest paid by it on time and savings deposits from its gross earnings for tax purposes under Sec. 1701 (p. 23, *infra*).

Hamilton filed a petition for review by the United States Court of Appeals for the District of Columbia Circuit of the decision of the Board (p. 22, *infra*).

On appeal,[4] Hamilton made three contentions (p. 22, *infra*). The Court rejected the first and third contentions of Hamilton (pp. 23, 29, *infra*). Hamilton's *first contention* was that interest paid its depositors on savings accounts is deductible in computing gross earnings for tax purposes. In rejecting this contention, the Court said that it agreed with the Board that "this interest falls within the deductions from gross income or gross earnings in the computation of net income, rather than among the eliminations which must be made from gross receipts in order to ascertain income or earnings" (p. 23, *infra*). The *third contention* of Hamilton was that the tax in controversy was a discrimination violative of Sec. 5219 of the Revised Statutes (12 U.S.C.A., Sec. 548). The Court below pointed out that that statute is addressed to the legislatures of the States, and the statutes involved in this case are Acts of the Federal Congress. However, the Court was of opinion that Sec. 5219 was of value in this case as an indication of Congressional policy, and that to that extent Hamilton's *third contention* was sound. (p. 29, *infra*.)

The *second contention* of Hamilton, as stated by the Court of Appeals, was that "the difference in treatment accorded

---

[4] The opinion of the Court of Appeals in the first appeal is reproduced as an appendix to this petition and brief for the convenience of this Court (pp. 21-29, *infra*).

by the taxing authorities to national banks and state banks is an illegal discrimination which voids the tax upon" Hamilton (p. 24, *infra*). It was under this second contention of Hamilton that the first appeal was decided by the Court of Appeals.

The Court of Appeals found that discriminations were "presently existing" against Hamilton (p. 29, *infra*). The Court rejected any idea that those discriminations were in the statutes themselves, saying that:

> "* * * It is apparent that the 1904 act was intended to subject incorporated savings banks to a tax different from the tax imposed on other incorporated banks, including national banks. This classification of banks by the Congress for tax purposes rested upon reasonable differentials and was, therefore, valid. * * *" (p. 24, *infra*.)

This being so, the Court then considered the question of discrimination in "administrative action" (p. 25, *infra*).

With reference to the administrative action, the Court said that it did not think that "the simple ascertainment of whether a bank has a national charter or a state charter is a proper method of determining whether the bank is or is not an incorporated savings bank" (p. 24, *infra*). The Court said that the answer to the question of what is a savings bank must be reached "by viewing what was actually done", and that "Legally speaking, the test applied by the administrative authorities in the case at bar is arbitrary" (p. 25, *infra*).[5]

Having found the administrative action to be "arbitrary", the Court said that the next question was "whether

---

[5] Presumably, the test which the Court spoke of as being arbitrary was the administrative action in assessing national banks under Sec. 1701 where they are specifically designated, and taxing non-national banks under Sec. 1703 consistently with long administrative interpretation (R. 479, 480). After the decision of the Court of Appeals in the first *Hamilton* case, the administrative authorities taxed the non national banks under Sec. 1701, but that action was set aside by the Board (R. 479).

the administrative action is so improper as to be invalid" (p. 25, *infra*). In discussing this question the Court had occasion to state that:

> "* * * The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states. The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. The Supreme Court has held as settled that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due-process clause, and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment. But we are not considering the validity of an act of Congress and need not go into the question whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter. * * *" (pp. 25, 26, *infra*.)

In disposing of the case, the Court reversed the decision of the Board and remanded the case with instructions to cancel the assessment against Hamilton unless the tax Assessor, upon a reexamination of the entire subject of taxing banks in the District, removed the discriminations "presently existing", and said that if the tax Assessor did so "the validity of his further proposals may be considered" (p. 29, *infra*).

After remand, the Assessor of the District of Columbia reexamined the entire subject of taxing banks in the District of Columbia and concluded that there is no bank in the District which qualifies as an incorporated savings bank paying interest to its depositors for purposes of classification and taxation under the provisions of the second paragraph of Sec. 1703. He proceeded, accordingly, to tax all banks in the District, both national and non-national,

at the higher rate of taxation provided by Sec. 1701. The banks so assessed, these respondents, constituted all the banks engaged in business in the District during that fiscal year, other than national banks and trust companies. Thereafter the non-national banks appealed to the Board from the additional taxes assessed against them as aforesaid, upon the principal ground that the Assessor had erroneously determined that they were not incorporated savings banks subject to tax under Sec. 1703. Upon appeal to it, the Board held that the appealing non-national banks were properly subject to tax only under Sec. 1703, and accordingly ordered refunds of the amounts assessed as additional taxes under Sec. 1701. From the decisions of the Board in the seven cases of the non-national banks, the District appealed to the Court below. (R. 479.)

Subsequent to the decisions in the cases of the seven non-national banks, the Board considered the case of Hamilton, pursuant to the remand, and concluded, as matters of law, (1) that the discrimination found by the Court of Appeals upon its review in the first case had been removed (R. 480) and (2) that the decision of the Board in the first appeal of Hamilton to it should not be set aside (R. 479). Thereupon Hamilton filed its petition for review of the Board's decision in its case by the Court below (R. 479).

All eight cases (Hamilton and these seven non-national banks) were argued in the Court of Appeals on the same day and were disposed of in a single opinion (R. 477).

The disposition of the cases by the Court below may be summarized by the following quotation from the opinion:

> "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions which have interest-bearing savings deposits, and impose upon them the form of taxation set up in § 1703, the national banks in the District which have interest-bearing savings deposits must

> be classified and taxed in the same manner. The order of the Board of Tax Appeals in the Hamilton National Bank case will be set aside." (R. 483.)

From the foregoing quoted portion of the opinion of the Court of Appeals, it might be inferred that the Assessor of the District of Columbia has it within his power to discontinue the classification of the non-national commercial banking institutions as "incorporated savings banks." Such is not the case, however, since the Court held in this opinion that "the Board of Tax Appeals was justified in holding the state-chartered banks to be taxable under § 1703 as incorporated savings banks" (R. 481). It may be significant that the Court used the word "justified" and not the more exact word "correct."

The net effect of the opinion of the Court below may be summarized in the following manner:

> National banks must not be taxed under Sec. 1701, which specifically provides for the taxation of national banks, but must be taxed under Sec. 1703, which provides for the taxation of "savings banks" and of "incorporated savings banks" and does not mention national banks.
>
> Non-national banks which are primarily engaged in a general commercial banking business and also have substantial savings deposits, must not be taxed under Sec. 1701, which specifically provides for the taxation of national banks and of other incorporated banks and trust companies, but must be taxed under Sec. 1703, which provides only for the taxation of "savings banks" and of "incorporated savings banks."

Petitioner's principal complaint with the opinion of the Court of Appeals in these cases is directed to the effect of the opinion on Sec. 1701. The effect of that opinion is to repeal Sec. 1701 by implication insofar as that section imposes a tax at the rate of 6% per annum on the gross earnings of "national banks" and also of "all other incorporated banks."

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered May 31, 1949 (R. 485). The petition for rehearing before the full Court was filed June 14, 1949, and denied July 20, 1949 (R. 493, 494). The jurisdiction of this Court to issue a writ of certiorari in these cases is invoked under Title 28, U.S. Code Sec. 1254 (Act of June 25, 1948, 62 Stat. —, ch. —).

QUESTION PRESENTED.

The question presented is whether incorporated banks engaging in a general commercial banking business in the District of Columbia and having substantial savings deposits upon which they pay interest are subject to tax at the rate of 6% per annum upon their gross earnings as "incorporated banks," or are subject to tax, as the Court of Appeals has held, as "incorporated savings banks" at the rate of 4% per annum upon their gross earnings less the amount paid as interest to their depositors, under statutes enacted by the Federal Congress.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals for the District of Columbia Circuit has decided a question of substance relating to the construction and application of statutes enacted by the Congress, and, as a result of that construction, has decided the application of the Constitution of the United States. These matters have not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit disposed of these seven cases and the case of *Hamilton National Bank* v. *District of Columbia* in a single opinion. In that opinion, and as the direct result of its decision with respect to these seven cases, that Court

has not given proper effect to the decisions of this Court with respect to the legislative power of the Federal Congress.

This Court has held that the Fifth Amendment to the Federal Constitution contains no equal protection clause and that a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under that Amendment; but the Court below has declared in the opinion in these cases and the case of *Hamilton National Bank* v. *District of Columbia* that the Fifth Amendment as applied to the District of Columbia implies equal protection of the laws, and that inequality in the incidence of a tax imposed by the Federal Congress upon taxpayers engaged in the same type of business renders a statute unconstitutional upon the theory that the statute denies due process and equal protection of the laws under the Fifth Amendment. It is believed that a review by this Court of the decision of the Court of Appeals in these cases is inseparable from a consideration of the decision of that Court in the case of *Hamilton National Bank* v. *District of Columbia,* in which latter case the District Government has applied for a writ of certiorari.[6]

3. The question presented in the case of *Hamilton National Bank* v. *District of Columbia* and these seven cases is applicable not only with respect to determining the constitutionality of the particular statutes involved but also to every statute enacted by the Federal Congress in the exercise of its exclusive jurisdiction to legislate for the District of Columbia.

4. The question is of general importance. The questions presented in these cases and in the case of *Hamilton National Bank* v. *District of Columbia* will affect not only those banks but every bank in the District of Columbia. In the words of the Court below in the first appeal in the *Hamilton* case: "The interests of all the banks are involved."

[6] No. 385, October Term, 1949.

WHEREFORE, your petitioner, the Government of the District of Columbia, prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in these cases, and that said cases may be reviewed and determined by this Court, and that the judgments of said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

DISTRICT OF COLUMBIA,
Petitioner.

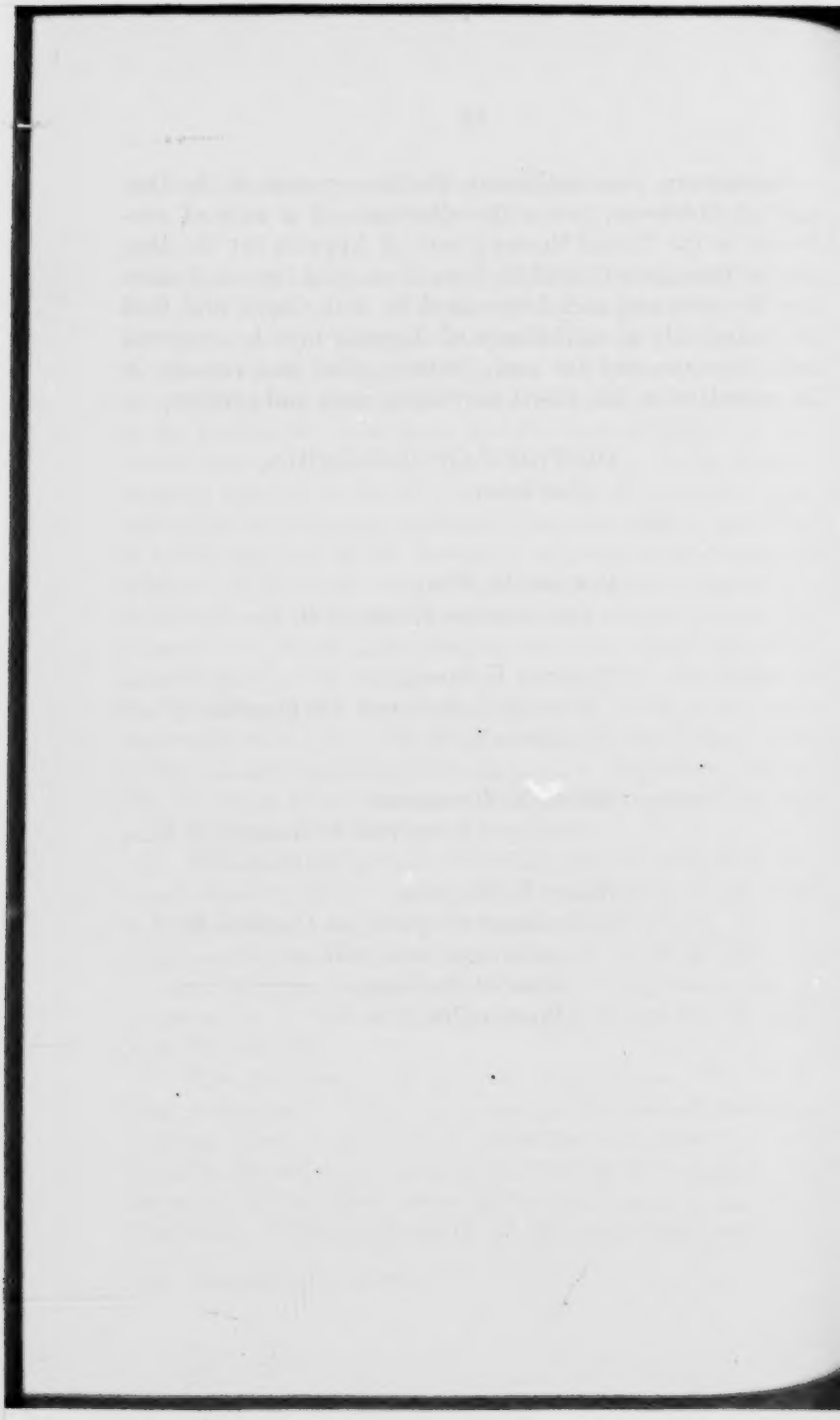
By:

VERNON E. WEST,
Corporation Counsel, D. C.

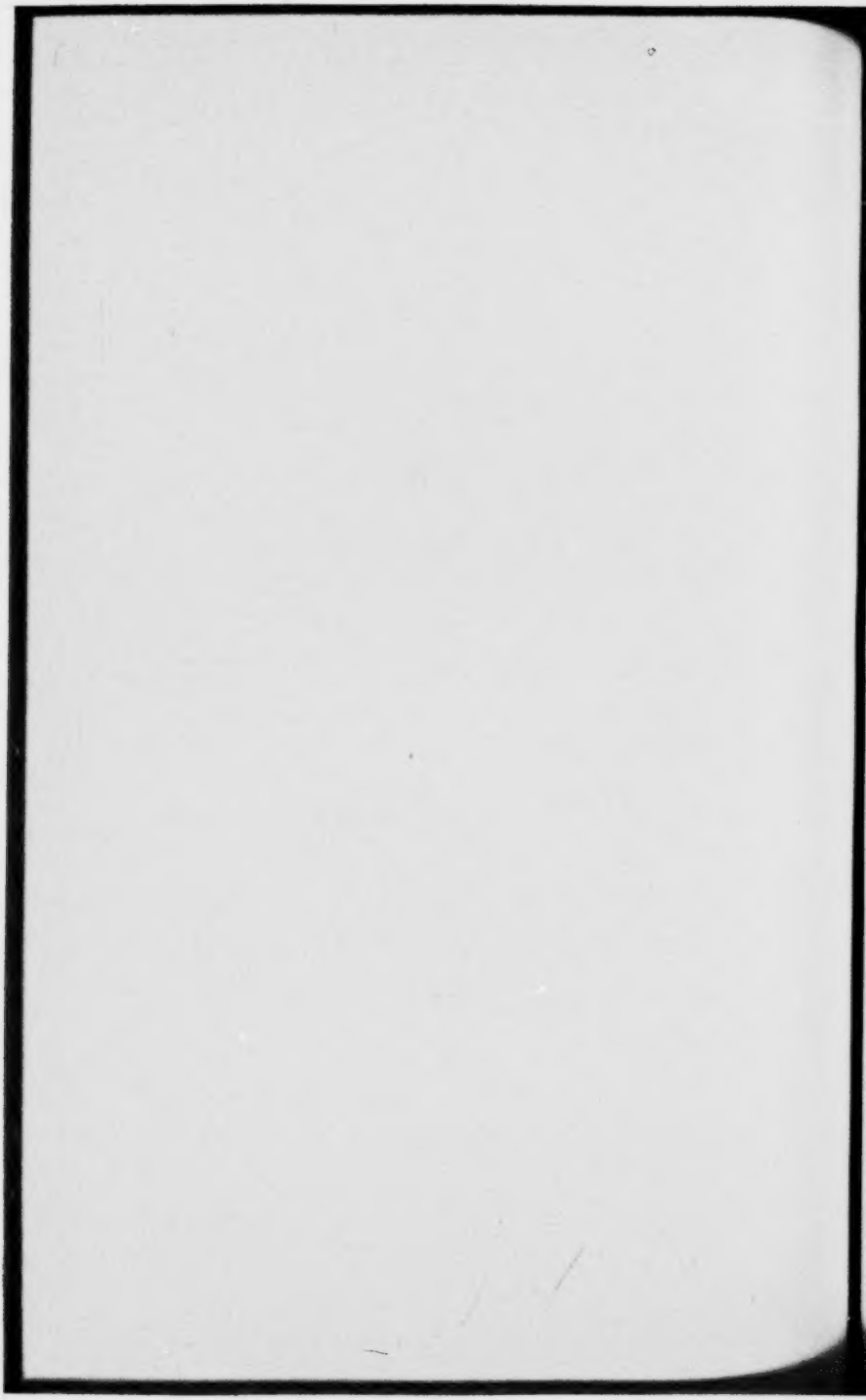
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.

HARRY L. WALKER,
Assistant Corporation Counsel, D. C.
Attorneys for Petitioner,
District Building,
Washington 4, D. C.



BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.



BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion (R. 476) of the United States Court of Appeals for the District of Columbia Circuit in these cases is not yet reported. The opinion of the Board of Tax Appeals for the District of Columbia (R. 22-27) in these cases is reported in 76 W.L.R. 633.

GROUNDS OF JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are:

1. The United States Court of Appeals has decided a question of substance relating to the construction and application of the Constitution and a statute enacted by the Congress of the United States which has not been, but should be, settled by this Court.

2. The United States Court of Appeal has not given proper effect to the decisions of this Court applicable to the question decided.

3. The United States Court of Appeals has decided an important question of law involving the Constitution and a statute of the United States applicable to the District of Columbia, which decision is in conflict with its own prior decisions and with the decisions of this Court relating to the power of Congress.

STATEMENT OF THE CASE.

The case is sufficiently stated in the petition (pp. 1-8, *supra*).

Provisions of Constitution and of Statutes Involved.

Art. I, Sec. 8, Cl. 17, of the Constitution provides, insofar as here pertinent, that:

> "The Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *"

The Fifth Amendment to the Constitution provides, insofar as here pertinent, that:

> "No person shall be * * * deprived of life-liberty, or property, without due process of law * * * "

Sec. 6, par. 5, of the Act of July 1, 1902, 32 Stat. 619, ch. 1352, as amended by Title IV, Sec. 2, of the Act of July 26, 1939, 53 Stat. 1107, ch. 367 (which, as amended, appears as Sec. 47-1701, D.C. Code, 1940), provides, insofar as here pertinent, that:

> "Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks and trust companies in the District of Columbia, * * * shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings * * * for the preceding year ending the thirtieth day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum six per centum on such gross earnings * * * ."

Sec. 6, par. 7, of the Act of July 1, 1902, 32 Stat. 619, ch. 1352, provides that:

> "Savings banks having no capital stock and paying interest to their depositors shall, through their president or cashier, make affidavit to the board of personal-tax appraisers on or before the first day of August in each year as to the amount of their surplus and undivided profits, and shall pay to the collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the amount of their surplus and undivided profits on the thirtieth day of June preceding."

By the Act of April 28, 1904, 33 Stat. 564, ch. 1815, to said paragraph 7, *supra,* was added a new paragraph reading as follows:

> "Incorporated savings banks paying interest to their depositors shall, through their president or cashier, make report under oath to the board of personal tax appraisers on or before the first day of August in each year as to the amount of their gross earnings, less the amount paid as interest to their depositors for the preceding year ending June thirtieth and shall pay thereon to the collector of taxes of the District of Columbia four per centum per annum."

As amended, said paragraph 7 is codified as Sec. 47-1703, D.C. Code, 1940.

ARGUMENT.

The question is important.

There is no question but that each respondent was engaged, as both the Court of Appeals and the Board of Tax Appeals found, in a commercial banking business and all the activities which that phrase implies (R. 24, 478). It is also indisputable, as both the lower tribunals also found, that each respondent had substantial savings deposits upon which it paid interest (R. 24, 25, 478).

The language of Secs. 1701 and 1703 is plain and unambiguous. Sec. 1701 taxes "each national bank * * * and all other incorporated banks and trust companies" at the rate therein prescribed. Sec. 1703 taxes "savings banks having no capital stock and paying interest to their depositors", and "incorporated savings banks paying interest to their depositors" at the respective rates therein prescribed.

The Board concluded that Hamilton National Bank must be taxed under Sec. 1701, and that the non-national banks must be taxed under Sec. 1703. The "standards" used by the Board in reaching those conclusions consisted of "consideration of the character of business done by the appealing banks, and the legislative and administrative history of the applicable statutes". (R. 24, 26, 479.)

As we read the opinion, the United States Court of Appeals for the District of Columbia Circuit held:

(1) The Board "was justified in holding the state-chartered banks to be taxable under § 1703 as incorporated savings banks" (R. 481);

(2) "Measured by the standards used by the Board in concluding state banks are incorporated savings banks", the Hamilton National Bank (respondent in No. 385) is "of the same character" (R. 480);

(3) In view of the two foregoing premises, to tax national banks in accordance with the classification made and at the rate fixed by Congress in Sec. 1701 is not permissible because Congress did not intend national banks to be so taxed; but even if Congress intended national banks to be taxed at the rate prescribed by Sec. 1701, the classification made by Congress results in such oppressive discrimination against national banks as to be unconstitutional by denying them "the due process guaranteed by the Fifth Amendment and the equal protection of the

laws implied therein for the benefit of the inhabitants of the District of Columbia" (R. 482).

The respondents herein are neither "national banks" nor "trust companies". On the basis of business done by them, respondents do not come within the traditional meaning of the term "incorporated savings banks" (R. 481). It is petitioner's position that non-national banks could be classified for taxation as "other incorporated banks" and taxed under Sec. 1701 without doing any violence to the plain language of either Sec. 1701 or Sec. 1703. Thus, even if the United States Court of Appeals be correct in holding that the Fifth Amendment affords "equal protection", and even if the classification by Congress of two separate and distinct classes of banks (national and non-national)for tax purposes at different rates amounts to a denial of "equal protection", a holding by the Court of Appeals that both national and non-national banks are subject to taxation under Sec. 1701 would have eliminated both the discrimination found by the Court to exist and also all question of denial of "equal protection". By these statements petitioner does not, for one moment, imply that it concurs in the theory of the Court of Appeals that "equal protection of the laws" for the inhabitants of the District of Columbia is implied in the Fifth Amendment to the Federal Constitution. On the contrary, petitioner submits that the decisions of this Court make it abundantly clear that there is no "equal protection of the laws" expressed or implied in the Fifth Amendment.[7]

The Court of Appeals rejected the contentions of the District Government that (1) Congress classified "national banks" for tax only under Sec. 1701 and that, therefore, no administrative official had power to change that classification, and (2) if any discriminations existed in the taxation of banks in the District those discriminations could be

[7] See, for example, *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468, 86 L. Ed. 343, 62 S. Ct. 341.

removed, if they must be, only by subjecting the non-national banks to tax under the same provision as national banks, viz., Sec. 1701. Instead, the Court disregarded the plain language of Sec. 1701 and held that national banks must be taxed under Sec. 1703 in spite of the fact that Congress did not mention national banks in that latter section.

The effect of the decision of the Court of Appeals is to effectively repeal, by implication, Sec. 1701 insofar as that provision of law taxes banks. Under Sec. 1701 the tax is imposed on "each national bank" and "all other incorporated banks and trust companies" in the District. Aside from "trust companies", there are, of course, no banks in the District other than national banks and these respondents. If, as the Court of Appeals has held, both types of banks must be classified under Sec. 1703 for tax purposes, there will be, therefore, no banks subject to tax under Sec. 1701. And if national banks are to be taxed as "incorporated savings banks paying interest to their depositors" a very appealing and logical argument could be made in behalf of "trust companies", which were also designated for tax under Sec. 1701, that they too must be taxed as "incorporated savings banks paying interest to their depositors" under the amendatory Act of 1904, since trust companies in the District of Columbia as well as national banks are under the regulatory control of the Comptroller of the Currency, and, as is common knowledge in the District, have savings accounts upon which they pay interest to their depositors. As a matter of fact, in *Watts* v. *American Security & Trust Co.*, 47 A. 2d 100, the Municipal Court of Appeals for the District of Columbia referred to the trust company involved as the "appellee bank". If, however, on the other hand, "trust companies" are to remain subject to tax under Sec. 1701 at the higher rate, will they not have a valid claim for "equal protection"? While it is true that to construe the statute so as to tax "trust companies" at a

higher rate of tax than "state banks" would not be "at war with the clear Congressional purpose expressed in § 5219 of the Revised Statutes" in the same manner that the Court of Appeals suggested would be true with respect to "national banks" (R. 482), the trust companies would, however, be protected from a construction subjecting them to taxation under Sec. 1701 by "equal protection of the laws", which the Court of Appeals said ought to be included or implied in the Fifth Amendment to the Federal Constitution. Thus the effect of the decision of the Court of Appeals is to repeal Sec. 1701 by implication. It is a well-established rule that repeals by implication are not favored, and that a general statute, without negative words, will not repeal particular provisions of a former statute, unless the two acts are irreconcilably inconsistent.[8] **Moreover, Sec. 1701 was reenacted by the Congress in 1939 without any change in the language with respect to the taxation of banks and trust companies.**[9]

But for the decision of the Court of Appeals that these respondents were properly subject to tax only under Sec. 1703, there would have been no question of "discriminations" and, hence, no question of "due process" or of "equal protection of the laws". For that reason, it is believed that a proper consideration of the case of *District of Columbia* v. *Hamilton National Bank*, No. 385, October Term, 1949, is inseparable from the consideration of these cases.

CONCLUSION.

It is, therefore, respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, in order that a proper construction of the Constitution

[8] *Wood* v. *United States*, 41 U. S. (16 Pet.) 342, 10 L. Ed. 987; *United States* v. *Henderson*, 78 U. S. (11 Wall.) 652, 657, 20 L. Ed. 235; *Wilmot* v. *Mudge*, 103 U. S. (13 Otto) 217, 26 L. Ed. 536; *Frost* v. *Wenie*, 157 U. S. 46, 39 L. Ed. 614, 619, 15 S. Ct. 532.

[9] Act of July 26, 1939, 53 Stat. 1107, Ch. 367, title IV, Sec. 2.

and of the Acts of Congress involved may be had, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia Circuit in these cases, and finally reverse it.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.

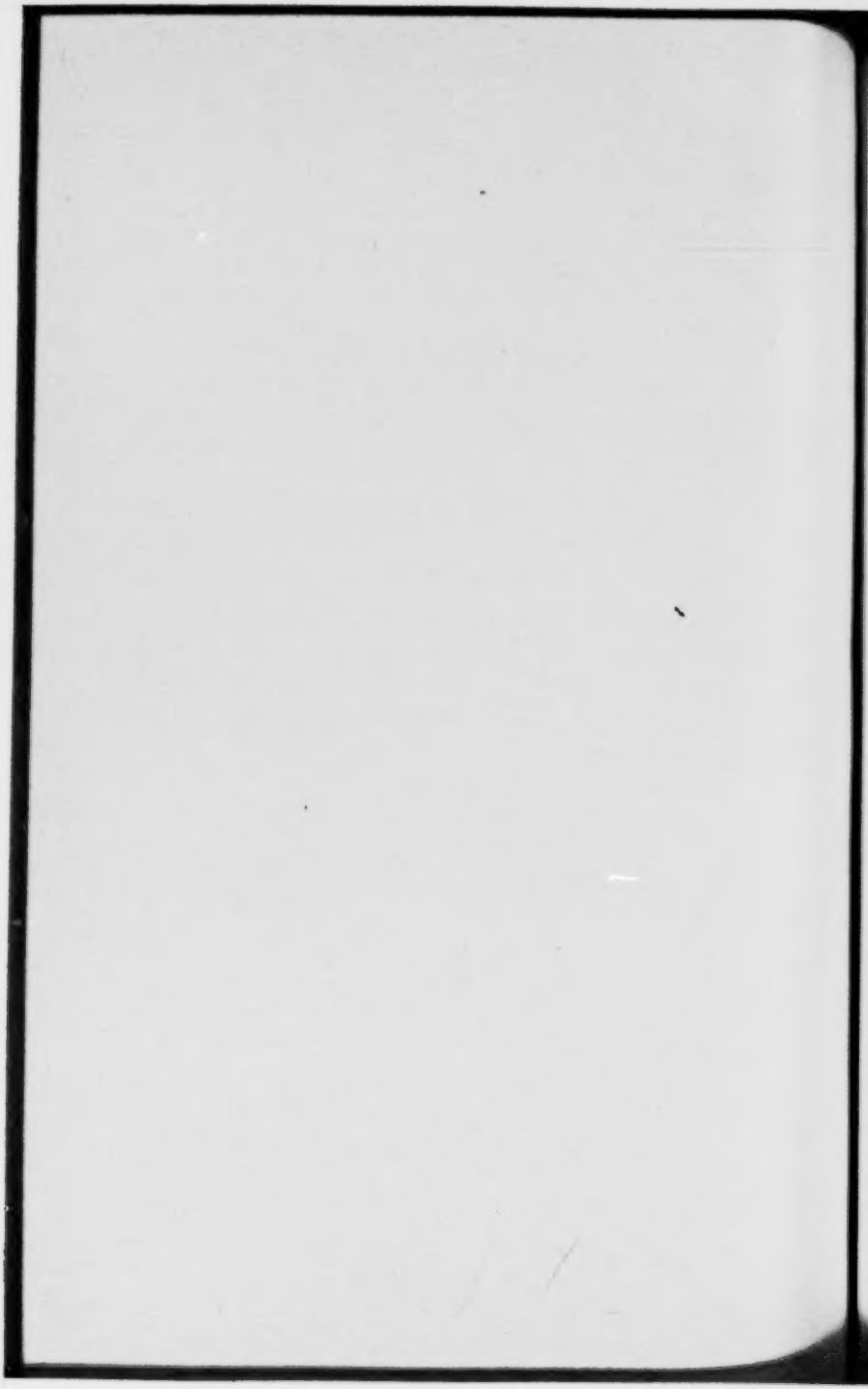
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.

HARRY L. WALKER,
Assistant Corporation Counsel, D. C.
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

APPENDIX

Opinion of the United States Court of Appeals for the District of Columbia Circuit in Hamilton National Bank v. District of Columbia (1946), 81 U. S. App. D. C. 200, 156 F. 2d 843.



UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

No. 9192

HAMILTON NATIONAL BANK, PETITIONER

v.

DISTRICT OF COLUMBIA, RESPONDENT

On Petition for Review of Decision of the Board of Tax Appeals for the District of Columbia

---

Argued May 28, 1946. Decided June 28, 1946.

Mr. Roger J. Whiteford, with whom *Mr. Philip S. Peyser* was on the brief, for petitioner.

Mr. Harry L. Walker, Assistant Corporation Counsel, District of Columbia, with whom *Mr. Vernon E. West,* Corporation Counsel, District of Columbia, and *Mr. Chester H. Gray,* Principal Assistant Corporation Counsel, District of Columbia, were on the brief, for respondent.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

PRETTYMAN, J.: Petitioner is a national bank doing business in the District of Columbia. There are in the District other national banks and also banks incorporated

under various state laws. Some of these banks, both national and state, have savings departments and pay interest to savings depositors. These same banks do a general commercial banking business.

Two pertinent statutes impose taxes on banks in the District of Columbia. One provides that every national bank and all other incorporated banks shall pay 6 per cent a year on their gross earnings.[1] The other provides that incorporated savings banks shall pay 4 per cent a year on their gross earnings less the interest paid to their depositors.[2] The first was enacted in 1902 and the second in 1904.

The local taxing authorities treat banks incorporated under state laws as incorporated savings banks and treat national banks as not savings banks. Petitioner protested its assessment, claiming the right to deduct from its gross earnings the interest paid its depositors. The Board of Tax Appeals for the District of Columbia affirmed the Assessor. Petition for review of that decision by this court was then filed.

Petitioner makes three contentions. The first is that interest paid depositors on savings accounts is deductible in computing gross earnings, under the doctrine of *District of Columbia* v. *Georgetown Gaslight Co.*, 45 App. D. C. 63 (1916), and *Chesapeake & Potomac Telephone Co.* v. *District of Columbia*, 78 U. S. App. D. C. 53, 137 F. 2d 674 (1943). In the *Georgetown Gaslight Company* case, this court held that the cost of raw materials used in manufacture is deductible from gross receipts in computing gross earnings. In the *Telephone Company* case, this court applied the same doctrine to the cost of telephone directories supplied subscribers by the company. But we are not disposed to extend the doctrine of those cases. Gross receipts, gross income, and net income are different concepts. We need not venture too far into the discussion

[1] D. C. Code (1940) § 47-1701.
[2] D. C. Code (1940) § 47-1703.

which has engulfed the subject for a half-century.[3] Receipts differ from income as a matter of economic concept and constitutional importance, the former including capital and the latter not. Gross income becomes net by deductions. "Gross earnings" is not so certain in meaning but, generally speaking, means gross income. In this scheme of things, the cost of raw materials is eliminated from receipts to ascertain income, because income is gain and no gain is derived until cost of goods is recovered. In this same scheme of things, interest paid is, by established practice, a deduction from gross income in the computation of net income. Interest paid by banks on savings accounts is so treated.[4] Petitioner's contention is, in ultimate substance, either that interest on savings accounts is an elimination from receipts in the computation of gross income, or that gross earnings differ from gross income in that items like this interest must be eliminated from the latter to ascertain the former. It argues that interest paid depositors is to a bank the cost of its raw material, *i.e.*, money; or at least the same sort of an item as a telephone book to a telephone company. The rationale of the rule is difficult to state,[5] but we are not disposed to depart from the traditional treatment of the item. The same result is indicated by the provision of the Code here involved, which refers to "gross earnings, less the amount paid as interest to their depositors", when the deduction of interest was intended. We agree with the Board of Tax Appeals that this interest falls within the deductions from gross income or gross earnings in the computation of net income, rather than among the eliminations which must be made from gross receipts in order to ascertain income or earnings.

---

[3] *See* 1 MERTENS, LAW OF FEDERAL INCOME TAXATION (1942) c. 5.

[4] *See* U. S. Treas. Reg. 111, § 29.23(b)-1; First National Bank of Braddock, 38 B. T. A. 1244 (1938).

[5] For federal income tax purposes, cost of goods sold is determined for mercantile and manufacturing companies by the use of inventories. The Treasury includes as raw materials those which have been acquired for sale or which will physically become part of merchandise intended for sale. U. S. Treas. Reg. 111, § 29.22(c)-1. *See* Francisco Sugar Co. v. Comm'r, 47 F. 2d 555 (C. C. A. 2d, 1931); Burroughs Adding Machine Co., 9 B. T. A. 938 (1927).

Petitioner's second contention is that the difference in treatment accorded by the taxing authorities to national banks and state banks is an illegal discrimination which voids the tax upon petitioner. It is apparent that the 1904 act was intended to subject incorporated savings banks to a tax different from the tax imposed on other incorporated banks, including national banks. This classification of banks by the Congress for tax purposes rested upon reasonable differentials and was, therefore, valid. The questions are three: Was the test used by the administrative officers for determining what is a savings bank proper? If improper, was the test so improper as to be invalid? If the administrative action is invalid, what, if any, remedy is available to a national bank?

We do not think that the simple ascertainment of whether a bank has a national charter or a state charter is a proper method of determining whether the bank is or is not an incorporated savings bank. The test should have some relation to savings deposits. If state banks engaged in the savings-account business and national banks did not, the nature of the charter might be an easy rule of thumb for identifying a savings bank, or might be an inevitable coincidence with the fact of being a savings bank. But such is not the case. National banks are fully authorized to receive savings deposits and to pay interest on them.[6] This petitioner has time and savings deposits as large as, if not larger than, the similar deposits of the state banks classified as savings banks for tax purposes. On the other hand, the state banks do a general commercial banking business just as do the national banks; none is engaged exclusively in receiving and investing savings deposits. The charter powers of the several banks, national and state, vary in detail, but appear to be substantially equivalent in respects pertinent here. All are under the same regulatory control, the Comp-

[6] 12 U. S. C. A. § 371.

troller of the Currency.[7] The rates of interest paid savings depositors are "pretty much uniform". The evidence upon the hearing was that so far as commercial and savings accounts are concerned the business is identical. So that, so far as savings deposits are concerned, there is no difference between the national banks and the state banks. For that reason, we do not think that an administrative classification of state banks as savings banks, and national banks as not savings banks, is proper. As we said in *Neild* v. *District of Columbia,*[8] in discussing Congressional power, the selection for classification must "rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed". As we said again, in *A-C Inv. Ass'n* v. *Helvering,*[9] discussing what is a savings bank under the federal income tax law, the answer is reached "by viewing what was actually done." Legally speaking, the test applied by the administrative authorities in the case at bar is arbitrary.

The next question is whether the administrative action is so improper as to be invalid. The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states.[10] The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. The Supreme Court has held as settled that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due-process clause,[11] and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment.[12] But we are not considering the validity of an act of Congress and need not go into the question

---

[7] D. C. Code (1940) § 26-101.
[8] 71 App. D. C. 306, 110 F. 2d 246 (1940).
[9] 62 App. D. C. 339, 68 F. 2d 386 (1933).
[10] *Wight* v. *Davidson,* 181 U. S. 371, 45 L. Ed. 900, 21 S. Ct. 616 (1901).
[11] *Heiner* v. *Donnan,* 285 U. S. 312, 326, 76 L. Ed. 772, 52 S. Ct. 358 (1932).
[12] *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585, 81 L. Ed. 1279, 57 S. Ct. 883 (1937); *see Neild* v. *District of Columbia, supra.*

whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter. The matter before us is the validity of an administrative action, and the scope of the power of classification by an administrator under a statute is obviously much less broad than is the power of the Congress in the first instance. While an interpretative administrative regulation consistent with the statute has great weight, one which "operates to create a rule out of harmony with the statute, is a mere nullity."[13] We do not think that an administrative officer can restrict a statutory term such as "incorporated savings bank" by a definition having no relation to savings deposits or accounts. He cannot eliminate, by administrative definition, from the statutory provision some institutions identical in all respects related to savings deposits with institutions included in his definition. His attempt to do so is invalid as not in harmony with the statute.

In the view which we take of the case, it is not necessary for us to define an incorporated savings bank. "Until recently," the Supreme Court said in 1878,[14] the primary idea of a savings bank was an institution in the hands of disinterested persons, the profits of which inured wholly to the benefit of the depositors. It was, said the Court, quasi benevolent. That case concerned a savings bank in the District of Columbia incorporated by an act of Congress, and called the "National Union Savings-Bank of the District of Columbia". In 1883 the Supreme Court of the District of Columbia considered a case[15] in which an incorporated savings bank was converted by its trustees into a national banking association, pursuant to Section 5154 of the Revised Statutes and an act of June 30, 1876.[16] The

---

[13] *Manhattan Co.* v. *Comm'r*, 297 U. S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 397 (1936).

[14] *Huntington* v. *Nat. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777 (1878).

[15] *Keyser* v. *Hitz*, 2 Mackey 473 (1883).

[16] 19 Stat. 64.

latter act provided that "all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks:".[17] The court thought that there might be a question whether that act did not, by its own operation, and without the necessity of any action by the banks, convert the savings banks in the District of Columbia at once into national banks, but said that the practical interpretation of the act had been for the banks themselves to take some action of conversion. Historically, therefore, in the District of Columbia there is no incongruity between savings bank and national bank.

We have now to consider the disposition of the case. The fact that the administrative classification of banks is invalid does not, of itself, determine whether all these banks having identical savings-deposit businesses are or are not incorporated savings banks within the meaning of the statute. Respondent contends, and the Board of Tax Appeals held, that petitioner could not complain of the discrimination because the banks favored by the administrative practice are not in the proceeding. That position is obviously without merit. The person discriminated against is really the only person who can complain of the discrimination. Certainly he is the only one who does.

While, as we have said, the equal-protection clause does not apply here, the course followed by the Supreme Court in disposing of cases wherein administrative action has been held invalid because of that clause, furnishes a guide for

[17] The quoted provision of the 1876 act was included in the 1901 Code, Section 713, but was omitted in an amendatory enactment of June 30, 1902 (32 Stat. 534). We have been unable to find any helpful legislative history relating to this amendment. Various statutes relating to national banks were extended to apply to savings banks in the District of Columbia by an act of March 4, 1933 (47 Stat. 1566, D. C. Code (1940) § 26-104).

our action here. In *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923), and again in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. Ed. 265, 52 S. Ct. 133 (1931), the Court, faced with this same dilemma, directed that the higher tax be reduced to the level of the favored taxpayers. Chief Justice Taft, in the former case, said that this should be done "even though this is a departure from the requirement of statute." He said:

> "The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

The difference in treatment accorded the national banks and the state banks, reflected in the record in the case at bar, is not a mistake or an error in judgment; it was shown to be consciously done, and in that sense intentional, and systematic.[18]

But our relation to the Board of Tax Appeals of the District of Columbia is more flexible than the relationship of the Supreme Court to the courts of the several states, and permits of directives as well as the usual appellate dispositions. The Board is "a constituent member of the assessing authority."[19] Our power to review its decisions is "as under the equity practice in which the whole case, both facts and law, is open for consideration",[20]—"the scope of a review of an equity court." The definition of "incorporated savings bank" is not merely the temporary disposition of the

---

[18] *Charleston Ass'n* v. *Alderson*, 324 U. S. 182, 190, 89 L. Ed. 621, 65 S. Ct. 624 (1945).

[19] *Watrous* v. *District of Columbia*, 77 U. S. App. D. C. 295, 135 F. 2d 654 (1943).

[20] *District of Columbia* v. *Pace*, 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406 (1944).

single assessment in the present proceeding but obviously concerns the taxation of the entire group of local banks as a continuing matter. The interests of all the banks are involved. The facts of the situation in 1904 when Congress enacted the special statute relating to incorporated savings banks, are pertinent. The various statutes which interrelate the local savings banks with the national banking laws would appear to have a bearing. The Comptroller of the Currency, under whose supervision all these banks operate, may have important interests in the subject or views which may be valuable. This factual data is by no means complete in the record before us. Moreover, the matter is of the sort which should first be crystallized by administrative action. The decision of the Board in this case will be reversed and the case remanded, with instructions to cancel the present assessment unless the tax Assessor, upon a reexamination of the entire subject of taxing banks under these statutes, removes the discriminations presently existing, in which latter event the validity of his further proposals may be considered.

Petitioner's third contention is that the proposed tax is a discrimination violative of Section 5219 of the Revised Statutes.[21] But that statute is addressed to the legislatures of the states, and the statutes with which we are concerned are acts of the Congress. Section 5219 is of value here as an indication of Congressional policy. To that extent petitioner's contention is sound. Our view of the case is in accord with that policy. But the section is not controlling in terms. Congress could, if it chose, tax national banks without regard to its provisions.

Reversed and remanded for further proceedings in accordance with this opinion.

---

[21] 12 U. S. C. A. § 548.